Appendix 3

SPLIT-ESTATE LANDS

OVERVIEW

In Wyoming, the BLM manages approximately 11.6 million acres of federal minerals under private surface, usually referred to as split estate. The majority of this split estate resulted from the Act of July 17, 1914, as amended, (30 U.S.C.§ 121,122) which opened prior withdrawn federal mineral lands to nonmineral entry, more specifically, the appropriate Homestead Acts (HA), and the Stockraising Homestead Act (SRHA) of December 29, 1916, as amended, (43 U.S.C.§ 299).

By the late 1800s much of the public domain lands had been transferred to private ownership either by sale or by homesteading. The annual report for 1882 from the General Land Office pointed out that companies had fraudulently acquired great quantities of valuable coal and other lands. In response to this and subsequent investigations President Theodore Roosevelt, in 1906, withdrew more than 66 million acres of coal lands from settlement and location. Congress questioned whether or not the President had authority to do this. In 1910 Congress passed the General Withdrawal or Pickett Act giving the President power to "temporarily" withdraw public lands from settlement and location for public purposes.

In response to the uproar that this created with politicians, business people, and homesteaders President Roosevelt signed the Act of March 3, 1909 which allowed homesteaders who had settled coal lands to patent those lands as long as the coal was reserved to the United States. The Act of June 22, 1910 permitted homesteaders to file for coal lands as long as the coal was reserved to the United States.

The mineral policies were extended to reserving portions or, in most cases, the full mineral estate to the United States by the Act of July 17, 1914. That Act opened lands that were withdrawn or classified for phosphate, nitrate, potash, oil, gas, or asphalic minerals or are valuable for those deposits to entry under the appropriate HA. Finally, the SRHA reserved all minerals to the United States.

As part of the mineral policies initiated during his Presidency, Roosevelt had advocated a leasing policy for coal and petroleum lands, but Congress resisted the idea. In 1917, potassium deposits could be leased with the enactment of the Potash Leasing Act, which was passed because potassium was essential to America's production of military explosives during World War I. After numerous proposals and much heated debate in the congress, the Mineral Leasing Act (30 U.S.C.§ 181 et seq.) was adopted in 1920 and extended leasing to coal, petroleum, natural gas, sodium, phosphate oil shale, and gilsonite. Under the appropriate provisions and authorities of the Mineral Leasing Act, individuals and companies could prospect for and develop the minerals listed.

Discussed in this appendix is what authority BLM has to condition and regulate federally authorized leases, specifically oil and gas, on split estate and the policy and guidance used to accomplish this.

The BLM is mandated by the Federal Land Management and Policy Act of 1976 (FLPMA), section 202, to develop, maintain, and revise land use plans on public lands where appropriate using and observing the principles of multiple use and sustained yield. Section 103(e) of the FLPMA defines public lands as any lands and interest in lands owned by the United States. The mineral estate is an interest owned by the United States. The BLM has an obligation to address this interest in their planning documents (43 CFR 1601.0-7(b); Bureau Manual 1601.09).

The FLPMA is intrinsically tied to the mandate provided by the National Environmental Policy Act of 1969 (NEPA). Specifically, section 102 of NEPA states, "Congress authorizes and directs the federal government and its agencies to use a systematic interdisciplinary approach which insures the integrated use of the natural and social sciences and the design arts in planning and decision making where man has an impact on man's environment." This theme is also present in section 202(c)(2) of the FLPMA where, as with NEPA, it recognizes that management of the public lands and resources (interest) and the consequences associated with their use or consumption are tied to biologic, ecologic, social, and economic boundaries and not merely surface boundaries.

Through the years, from the planning stage through development of the mineral estate, two areas of concern have consistently arisen from this split-estate issue: does the BLM have the statutory authority to regulate how private surface owners use their property, and does the BLM have the authority to condition and regulate federal mineral development such as a federal oil and gas lease. These two concerns have been addressed in the resolution of two RMP protests in 1988 on split estate (North Dakota RMP and Little Snake RMP) and two Washington Solicitor's Opinions (April 1 and 4, 1988). The conclusion states,

> "In summary, while the BLM does not have the legal authority in split estate situations to regulate how a surface owner manages his or her property, the agency does have the statutory authority to take reasonable measures to avoid or minimize adverse environmental impacts that may result from federally authorized mineral lease activity."

An example of this authority is a January 7, 1992 Interior Board of Land Appeals (IBLA) Decision (122 IBLA 36, Glen Morgan, January 7, 1992) which stated "The operator of an oil and gas lease is responsible for reclamation of land leased for oil and gas purposes, even after expiration of the lease and even where the surface estate is privately owned. Such reclamation includes the restoration of any area within the lease boundaries disturbed by lease operations to the condition in which it was found prior to surface disturbing activities." Another key point that was presented in this IBLA decision referenced the reservation of mineral reserves under section 9 of the SRHA. This section provides that reserved to the United States is the "right to prospect for, mine, and remove the [reserved minerals]," which right encompasses "all purposes reasonable incident to the mining or removal of the coal or other minerals" (43 USC §299, 1988). As long interpreted by the Department of the Interior, such purposes include reclamation of the surface of the affected land after mining is complete and the minerals are removed.

AUTHORITY

The Mineral Leasing Act of 1920 (MLA)

The Mineral Leasing Act, as amended (30 U.S.C. §§ 181-287) and its implemented regulations are the authority to lease and produce federal minerals. The restrictions identified through the planning process and attached to federal oil and gas leases constitutes a legal contract between the lessee and the BLM. No other party can change that contract without the expressed consent of the authorized officer. The authorized officer may waive, modify, or amend lease conditions as site-specific analysis dictates.

The section of the MLA that specifically refers to the regulation of surface-disturbing activities on oil and gas leased lands is found in 30 U.S.C. § 226(g), 1988. The key statement which does not distinguish between public surface and split-estate surface but applies to all leases is, " The Secretary of Interior, or for the National Forest lands, the Secretary of Agriculture, shall regulate **all** surface-disturbing activities conducted pursuant to **any** lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of the surface resources" (emphasis added).

It has been cited that Onshore Oil and Gas Order #1 of 1983, "Approval of Operations on Onshore Federal Land and Indian Oil and Gas Leases" is the final resolution to the split-estate mineral issue. The order has sometimes been interpreted to mean that BLM has waived all or many of its responsibilities during the development of the federal oil and gas where split estate is involved. The order does not rescind or revoke any of the law or regulations including the MLA that inspired it. Furthermore, this order cannot revoke any other BLM responsibility or obligation specified elsewhere in laws or regulations, again including the MLA.

The following are the laws and executive orders in addition to the MLA that pertain to split-estate federal mineral authorizations. They are not all inclusive; new laws and amendments are passed frequently.

Federal Land Policy and Management Act of 1976 (FLPMA)

The BLM is responsible for both considering the impacts of its actions and approvals in land use planning as well as for managing those impacts for public lands. The public land to be considered for split estate is the mineral interest and not the surface. The private surface is not public land; thus, it is not subject to the planning and management requirements of the FLPMA. BLM has no authority over use of the surface by the surface owner. The BLM is required to declare how the federal mineral estate will be managed in the RMP, including identification of all appropriate lease stipulations (43

CFR 3101.1; BLM Manual Handbook, H-1624-1, IV.C.2). To be consistent with the requirement of the FLPMA, it is necessary to apply the same standards for environmental protection of split estate lands as that applied to the federal surface (BLM Manual 3101.91 B.1). The FLPMA also provides in Section 202 that the BLM "...shall provide for compliance with applicable pollution control laws, including State and federal air, water, noise, or other pollution standards of implemented plans." Many of these laws are addressed later in this document.

National Environmental Policy Act of 1969 (NEPA)

The BLM's responsibilities on split-estate lands under NEPA are basically the same as for federal surface. Even though the impacts will occur on private surface, BLM is still responsible for considering alternatives or imposing protective measures since the impacts will be caused as a direct consequence of activities approved by BLM and conducted pursuant to a federal oil and gas lease. Mitigation measures for impacts which are identified during the NEPA analysis may be imposed under the general authority set out in sections 30 and 37 of the MLA of 1920 (30 U.S.C. §§ 187 and 193) and the policy of FLPMA. Other statutes that could apply for taking reasonable measures to avoid or minimize adverse environmental impacts that may result from federally authorized mineral lease activities are: the Clean Water Act of 19772 (CWA), the Clean Air Act (CAA), the National Historic Preservation Act (NHPA), the Endangered Species Act of 1973 (ESA), and the Federal Onshore Control and Reclamation Act of 1987 (FOCRA). The FOCRA specifically requires BLM to regulate surface disturbance and reclamation on all leases. With respect to offsite impacts which also could include off-lease, off-unit, or off-original patent boundary, mitigation must be considered and met in order to approve a lease action regardless of whether the surface is private or federal. The legal jurisdictional boundary (the lease boundary) and access to such will be discussed in more detail in the section "Access to Split Estate to Develop Federally Owned Minerals." If an operator cannot mitigate impacts of jurisdictional boundaries for lease development, BLM gives careful consideration as to whether the application could or should be approved. Also, before leasing the mineral estate or approving lease development, BLM determines whether that action would significantly affect the quality of the humane environment regardless of the surface ownership. In this analysis, BLM considers all impacts, even visual, of the proposed action whether those impacts are to surface resources, to use of the land by the surface owner, or to the subsurface. The BLM also takes into account the views of the surface owner and what effects implementing the mitigation measures for lease activity would have on his/her use of the surface.

National Historic Preservation Act (NHPA)

Section 106 of the NHPA requires the BLM to consider the effects of its actions on historic properties and to seek comments from the State Historic Preservation Officer and the Advisory Council on Historic Preservation (BLM Manual Section 8143.06). In fact, federal agencies are required to take into account the effect of any federally assisted or federally licensed **undertaking** on properties included on, or eligible for inclusion on, the National Register of Historic Places. These responsibilities are the same on split-estate land as on public land (BLM Manual 3101.9). The 1992 amendments to the NHPA replaced the definition of "undertaking" in Section 301 of the Act as follows,

> "Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including:
>
> (A) those carried out by or on behalf of the agency;
> (B) those carried out with federal financial assistance;
> (C) those requiring a federal permit, license, or approval; and
> (D) those subject to State and local regulation administered pursuant to a delegation or approval by a federal agency."

If activities to be conducted on split estate under the terms and conditions of a federal oil and gas lease would result in adverse effects to historic properties, BLM has the authority to impose appropriate avoidance or mitigation measures. Currently, the BLM Authorized Officer consults with the State Historic Preservation Officer (SHPO) to identify and evaluate historic properties that might be affected, to assess effects, and to determine satisfactory means for avoiding or mitigating adverse effects. The Advisory Council is then given the opportunity to comment only if listed or eligible properties would be affected. This process is explained in more detail in a current agreement between the Advisory Council, SHPO and BLM (regulation guidance is found in 36 CFR 800).

The BLM Manual 8100 (including the Wyoming manual supplements) contains guidance, policy, and

the extent that BLM is responsible on split estate. It also indicates direction when access is denied to an operator or BLM personnel in determining effects pursuant to the NHPA. Key points in the manual are that (a) any historic properties encountered belong to landowner and if the landowner wishes, any cultural material removed from the property would be returned after study; (b) the Authorized Officer must consider alternatives if the landowner continues to refuse access for cultural resource work, including the feasibility of relocating the project; and, (c) the Authorized Officer may also consider approval or denial of the application without the cultural resource information. The other avenue for access is by way of the courts and is addressed under "Access to Develop Federally Owned Minerals."

Endangered Species Act of 1973 (ESA)

Section 7 of the ESA requires federal agencies, in consultation with the Secretary (currently delegated to the U.S. Fish and Wildlife Service) to ensure that no action authorized, funded, or carried out by the agency is likely to jeopardize the continued existence of a threatened or endangered species, whether plant or animal, or would result in the destruction or adverse modification of a species' critical habitat. The ESA requirements apply to oil and gas leasing and operations on split estate just as they do to federal lands (Onshore Order No. 1; 43 CFR 3164.1).

A proposed surface-disturbing federally-related action cannot and must not be approved until all applicable federal statutory requirements have been met.

OTHER STATUTES AND EXECUTIVE ORDERS

Clean Water Act of 1977, as amended (CWA)

This act is an extremely complex and lengthy statue but is a key law regarding the control of toxic substances. It requires the BLM to participate with the state and other federal agencies in water quality planning and permitting activities. It was amended by the Water Quality Act of 1987 to require states to assess their rivers, streams, and lakes and to develop nonpoint source management plans to control and reduce specific nonpoint sources of pollution. It required federal agencies to be consistent with management programs. The 1987 Act added section 402(p) to the CWA to address storm water discharges under the National Pollutant Discharge Elimination System (NPDES). The discharge of any pollutant to surface waters of the United States is regulated by issuing a NPDES permit. This permit establishes effluent limitations and monitoring requirements for discharges. Oil and gas exploration and production (E&P) wastes discharged to surface water requires these permits. In 1990, the Environmental Protection Agency (EPA) published regulations requiring all storm water discharges associated with industrial facilities to obtain NPDES permits. Industrial discharges included construction projects where five or more surface acres are disturbed. Oil field development (surface disturbance) could be included in this definition. The State of Wyoming, Department of Environmental Quality (DEQ) has been delegated this responsibility from EPA of administering and issuing permits for this program. In order to meet the demand and number of permits, DEQ developed a single generic permit which was issued to cover a large number of similar facilities within a geographic area. The EPA granted DEQ primacy for general permits in 1991, and in 1992, DEQ issued its general permit for storm water discharges from construction activities.

Another portion of the CWA, amended by the Water Quality Act of 1987, that warrants discussion is section 404. In oil and gas surface-disturbing activities, section 404 must be complied with. This section covers all discharges of dredged or fill material into waters of the United States including lakes, streams, intermittent waterways, and wetlands. Certain categories of activities, including some oil and gas surface-disturbing activities, could be permitted under a current nationwide permitting system. The most frequent need for a 404 permit in oil and gas development is in road and pipeline construction through wetlands. Although many BLM specialists have been trained in the identification of wetlands, the authority for identifying and delineating wetlands lies with four federal agencies: Army Corps of Engineers (CE), EPA, Fish and Wildlife Service (FWS), and Natural Resources Conservation Service (NRCS). However, all activities affecting a riparian-wetland area which result in the discharge of dredge or fill material require a 404 permit. These are issued by the CE located at 504 West 17th Street, Cheyenne, WY 82001-4348, (307) 772-2300. Other permits are required when a 404 permit is needed. An example is a 401 permit (Water Quality Certification) from the DEQ. This certification is intended to demonstrate that the project will comply with state water quality standards and other requirements as may be imposed by the state. This is required before a 404 permit will be issued.

Clean Air Act of 1955, as amended (CAA)

The Act states that BLM and its permitted actions must comply with national and State air quality standards, It also directs BLM to cooperate with the states in carrying out their implemented plans. The Act also provides for the prevention of significant deterioration of air quality and places significant responsibility upon the BLM for the protection and, in certain cases, for enhancement of air quality and air-related values including visibility.

Executive Order (EO) 11988 of 1977, "Floodplain Management"

This EO states "direct or indirect support of floodplain development must be avoided whenever there is a practical alternative." The BLM Manual 7221 states, "Long- and short-term adverse impacts on natural and beneficial floodplains functions associated with the use and modification of floodplains must be avoided, to the extent possible; and actions causing definable adverse impacts (long- or short-term) to the natural and beneficial floodplain functions must include protection, minimization of damage, restoration, and preservation measures." The 1979 manual guidance is somewhat outdated; it refers to unit resource analysis (URA), management framework plan (MFP), and some BLM planning and environmental assessment guidance more recently updated, but the basic processes and guidance are still applicable. The resource area plans do not contain floodplain identification. The guidance refers to the appropriate official (BLM hydrologist) to identify the base (100-year chance of a flood) and/or critical (500-year chance of a flood) floodplain in relation to the location of the proposed action. This identification must extend upstream and downstream beyond the boundaries of the proposed action far enough to permit an analysis of the impacts that the proposal may have on the floodplain functions beyond the project boundary. Also, the public must be afforded an opportunity to be involved in the decision making process for all actions within a floodplain or that may affect it. The difference in restrictions for addressing proposed actions within base versus critical floodplains is somewhat lacking. However, for actions within base floodplains, the BLM will make a determination whether the proposed action will be located there. In critical floodplains, only critical actions will be identified and analyzed according to the Bureau environmental assessment process. Oil and gas activity especially involving major surface-disturbing activity qualify as critical action and should be appropriately assessed within a critical floodplain. The guidance does not state that BLM cannot authorize actions within floodplains, but it does state that mitigation and restoration measures must be completed for each alternative considered.

Executive Order 11990 of 1977, "Protection of Wetlands"

This EO directs federal agencies to take action to minimize the destruction, loss, or degradation of wetlands. All federally initiated, financed, or permitted construction projects in wetlands must include all practical measures to minimize adverse impacts. Section 404 of the CWA (discussed above) is one of the permit processes to protect or minimize adverse impacts to wetlands.

Eagle Protection Act of 1940

This act prohibits taking any golden or bald eagle or nests of such birds. Taking is defined under this statute to include molesting or disturbing. Violation of the prohibition in 16 U.S.C.§§ 668-668d is a criminal violation regardless of where the activity occurs, whether it is on public land, National Forest lands, or private lands.

Resource Conservation and Recovery Act of 1976, as amended (RCRA)

This law is used to regulate the treatment, storage, and disposal of hazardous wastes. Hazardous wastes are solid wastes that are listed or exhibit one or more of the characteristics of hazardous waste such as certain human toxicity criteria or contain one or more of 50 chemical compounds/substances that are listed as hazardous constituents. The RCRA defines solid wastes as any material that is discarded or intended to be discarded. It can be solid, semi-solid, liquid, or contain gaseous material. Oil and gas E&P wastes with the enactment of an amendment to RCRA in 1980 are exempt from the hazardous waste management and disposal requirements (subtitle C of RCRA [Section 3001(b)(2)(A)]). They include drilling muds and cuttings, produced waters, and associated wastes (40 CFR 261). Generally, E&P exempt wastes are generated in primary field operations and not as a result of transportation or maintenance activities. When listed nonexempt and exempt wastes are mixed, the entire mixture could be considered a hazardous waste. For example, discarding a half empty listed solvent in a reserve pit could cause the otherwise exempt reserve pit contents to become a hazardous waste. This may result in closure of a reserve pit under RCRA hazardous wastes regulations.

The amendment to RCRA also mandated EPA to study E&P wastes and recommend appropriate regulatory action to congress. EPA conducted the study and submitted the report to Congress on December 28, 1987. This regulatory determination was made public on June 30, 1988. A key portion of this determination follows:

> "The Agency plans a three-pronged approach toward filling gaps in existing State and Federal regulatory programs by:
>
> 1) Improving Federal programs under existing authorities in Subtitle D of RCRA, the Clean Water Act, and the Safe Drinking Water Act.[1]
>
> 2) Working with States to encourage changes in their regulations and enforcement to improve some programs; and,
>
> 3) Working with Congress to develop any additional statutory authority that may be required."

Some of the reasons put forth by EPA for this determination are:

— "Subtitle C does not provide sufficient flexibility to consider the costs and avoid the serious economic impacts that regulation would create for the industry's exploration and production operations;

— existing state and federal regulatory programs are generally adequate for controlling oil, gas, and geothermal wastes. Regulatory gaps in the Clean Water Act, and Underground Injection Control (UIC) program are already being addressed, and the remaining gaps in state and federal regulatory programs can be effectively addressed by formulating requirements under Subtitle D of RCRA and by working with the States; and

— it is impractical and inefficient to implement Subtitle C for all or some of these wastes because permitting burden that the regulatory agencies would incur if even a small percentage of these sites were considered Treatment, Storage, and Disposal Facilities (TSDFs)" (53 FR 25456, July 6, 1988).

[1] Nonhazardous wastes are regulated under Subtitle D of the RCRA. Subtitle D regulations are less extensive and depend primarily on state control.

The Interstate Oil and Gas Compact Commission (IOGCC) is an organization comprised of the governors of the 29 oil and gas producing states and has been assisting states in developing their oil and gas regulatory programs since 1935. In January 1989, the IOGCC formed a council on regulatory needs to assist EPA in its three-pronged approach mentioned above to fill the gaps in regulations. This council is comprised of 12 state regulatory agency members and is supported by a nine-member advisory committee made up of representatives from state regulatory agencies, industry, and public interest/environmental groups. This council is also assisted by representatives from EPA, Department of Energy (DOE), and BLM who act as official observers.

The purpose of the council is to recommend effective regulations, guidelines, and standards for state-level management of oil and gas production (E&P) wastes. It is not intended to form the sole basis for any future federal statutory or regulatory authorities that may be sought by EPA for E&P wastes. In 1990 the IOGCC adopted guidelines in the form of technical and administrative criteria recommended by the council and advisory committee. This publication, *EPA/IOGCC Study of State Regulation of Oil and Gas Exploration and Production Wastes* is known as "IOGCC Guidelines" or the "Green Book." These guidelines were update in May 1994 with the publication titled *IOGCC Environmental Guidelines for State Oil & Gas Regulatory Programs.*

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA)

The CERCLA, also known as "Superfund," and closely related to RCRA, is distinct and separate in that it mandates the cleanup of **hazardous substances** which encompasses a much broader range of products than does **hazardous wastes** defined by RCRA. It requires the potentially responsible party (PRP) to undertake cleanup (section 106) or to recover costs incurred in conducting remedial actions from PRPs (section 107). Hazardous substance means any element, compound, mixture, solution, or substance designated pursuant to section 102 of CERCLA.

The CERCLA provides for the exclusion of petroleum, including crude oil, or any fraction thereof which is not otherwise or specifically listed from the definition of hazardous substances, contaminants, or pollutants (sections 101 and 104). This also includes natural gas, natural gas liquids, liquified natural gas, and synthetic gas usable for fuel. The legislative

history of the petroleum exclusion in CERCLA indicates that although petroleum and any fractions thereof are exempt, hazardous substances that have been added to oil but are not normally found in petroleum at the levels added, are not exempt. EPA could respond under CERCLA to releases of **added** hazardous substances from E&P wastes. Several oilfield waste disposal sites that accept RCRA Subtitle C exempt wastes are now Superfund sites because these sites were not managed to prevent the release of hazardous substances. RCRA exemption does not release the operator of liability under CERCLA.

The CERCLA can be applied retroactively to provide for strict liability without regard to fault, and in appropriate circumstances, to impose joint and several liability. This liability may ultimately be the responsibility of the landowner, who also has the option of using CERCLA as the legal basis to sue the responsible parties who abandon hazardous substances on their land. It has been interpreted that any such release which is defined in section 101 of CERCLA occurring on split estate be removed by the responsible party as provided by 43 CFR 3162.5-1(c) and Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases (NTL-3A). It is further interpreted to expand the requirement by the BLM to federal oil and gas leases on split estate that any such release be removed in compliance with the regulations provided by RCRA for hazardous wastes and CERCLA for hazardous substances. **(This expanded interpretation is presently being review by BLM's Washington Solicitor.)** The reasoning for this expanded interpretation is leasing and subsequent development of the federal mineral estate on split-estate land is a federal action controlled by federal regulation and applicable federal and state laws. The BLM is the managing agency for federal oil and gas lease development on split estate. Although it could be strictly interpreted that the BLM is **not** the ultimate responsible landowner (surface owner), there is a legal and moral interpretation that the BLM (the mineral estate manager) in leasing the federal minerals, is the ultimate responsible party if all else failed to secure retribution for damages and cleanup from the responsible operators/lessees. This would release the private surface owner(s) from any lease development liability of which they have no direct control. However, it would not release the private surface owner(s) from potential liability for a release of hazardous waste or substance that they authorized on their land that was not part of the federal lease development.

There is a multitude of players as well as laws in solid waste management; it is difficult to determine who to call or who is responsible for what. The key experts for the BLM are the hazardous materials specialists/coordinators. The regulations for hazardous substances and wastes are found in 40 CFR, and they are the enforcement domain of EPA. The DEQ is anticipated to be delegated primacy from EPA for the enforcement of the solid waste management regulations including those for hazardous substances and wastes. This delegation is anticipated to take place in October 1995.

The Department of the Interior has the following fundamental principles of waste management:

> "Wherever feasible, we will seek to **prevent** the generation and acquisition of hazardous wastes; where waste generation is unavoidable, we will work to **reduce** the amounts (toxicity or risk) generated through the use of sound waste management practices; we will **manage** waste materials responsibly in order to protect not only the natural resources entrusted to us, but the many people who live and work on our public lands, and the millions more who enjoy our lands and facilities each year; we will move aggressively to **clean up and restore** areas under our care that are contaminated by pollution."

ACCESS TO SPLIT-ESTATE TO DEVELOP FEDERALLY-OWNED MINERALS

Any mineral lessee or operator (any person who has acquired from the United States the mineral deposits in such land) may enter and occupy as much of the private surface (patented) as may be required for the purpose of prospecting for mining or removal of minerals upon completion of any one of the following options (43 CFR 3814, 1994):

1. Upon securing a written consent or waiver of the surface owner(s) for lands covered by the federal lease and/or access to such lease over patented lands covered by the SRHA or HA estate or a single estate unified from several parcels originally patented under the above subject acts.

2. Upon payment of damages for crops, tangible improvements, and the value of the land for grazing purposes to the owner of the lands referenced in (1) above.

3. Upon the execution of a good and sufficient bond or undertaking to the United States

> for the use and benefit of the owner of the land referenced in (1) above, and to secure the payment of such damages for the crops, tangible improvements and the value of the land for grazing purposes of the owner as may be determined and fixed in an action brought upon the land or undertaken in a court of competent jurisdiction against the principles and sureties thereon.

For options 1 and 2 mentioned above, the BLM will require, at a minimum, a signed statement from the approved operator representative or the landowner that the operator/lessee and the landowner have reached an agreement for surface disturbance damages. The BLM also may require the operator/lessee to furnish any additional agreement with the surface owner for the protection of surface resources and the reclamation of disturbed areas for incorporation into conditions of approval for authorizing the action. If the agreement is not deemed adequate to protect both on and offsite damage to the lands, additional measures and mitigation will be required. If no agreement is reached, then the method according to option 3 must be followed. Under this method, a good and sufficient bond must be posted by the lessee/operator payable to the United States for payment for damages, specifically for crops, tangible improvements, and the value of the land for grazing purposes. Nationwide, statewide, and individual bonds should suffice for this coverage (BLM Manual 3104.1; Coquina Oil Corp., 41 IBLA 248, 1979; Theo R. Gassin, 55 IBLA 257, 1981). According to the procedures for this option, the lessee/operator must serve this bond on the affected landowner and serve proof to the appropriate BLM office that they have done so. This then prompts the BLM authorized officer to serve written notice (certified letter) to the landowner containing pertinent information about the proposed action and her/his right to protest. A copy must also be sent to the lessee/operator. The protest period runs for 30 days from date of service by BLM.

The emphasis in this section is on access within SRHA and HA patented land. This process for access also pertains to patents issued pursuant to section 203 (sales) and section 206 (exchanges) of the FLPMA.

The right to access an oil and gas lease includes all the land within the original patent even if that land is not within the lease. If an oil company wishes to cross one portion of a patent that has been subdivided into two portions to drill in the other portion, they have that right. In *Kinney Coastal Oil Co. v. Kieffer,* 277 US 488, 544 (1928), Coastal Oil, who held a federal oil and gas lease, sued the surface owner for subdividing the surface and erecting buildings for a town. The Supreme Court agreed with the oil company and ruled to prevent the use of the area as a commercial or residential area. Thus, the mineral owner's dominant servitude applies anywhere within the limits of the original patent no matter how far or often the surface estate has been subdivided. In another landmark case, *Mountain Fuel Supply Co. v. Smith,* 471 F. 2d (10th Cir. 1973), an oil company wished to cross 10 parcels to drill a well on the 11 parcel. All of the parcels have been patented at different times to different parties. At a later date, all of these parcels had been obtained by the defendant in this case. The court made no less than three significant holdings in this case. One, if the parcels had remained separately owned, the oil company would **not** have access rights across the 10 parcels to drill a well on 11; however, the company does have access rights on the 11th parcel on which they were to drill their well (471 F. 2d at 596,597). Two, where the surface ownership of all the parcels had been unified under a single ownership, the oil company would indeed have access across all the parcels (471 F. 2d at 597). Three, the approved unitization of the area by the appropriate authority was simply irrelevant (471 F. 2d at 597). The lessees were restricted to the development of their leases, or if appropriate, within a unit. The SRHA or HA access rights to develop federal mineral is dictated by the patented surface or a combination of patents unified by a single owner.

Following are three decisions options that may evolve in the protest period.

If no objections are received from the landowner within the protest period, the authorized officer will issue and serve a final decision of approval of the sufficient bond coverage to the landowner with a copy going to the lessee/operator. The lessee/operator can then enter onto the surface of the patented land(s) of which are affected by the lease provided all applicable federal and state laws are met.

If the surface owner files a protest (objection) to the bond within the protest period, the authorized officer will review the bond coverage, accompanying papers, and objections to determine whether the bond should be approved or disapproved. If the bond is disapproved, a decision will be served on the lessee/operator with a copy going to the landowner. The lessee/operator will have 30 days to appeal to the Director of the BLM. There have been cases where this appeal has gone to the Interior Board of Land Appeals; however, this is not the process according

to the regulations contained in 43 CFR 3814. If the bond is approved, the decision will be served to the surface owner with a copy going to the lessee/operator. The surface owner will be given 30 days to appeal the decision to the Director. If no appeal is filed, the authorized officer will serve a second final decision to the landowner approving the bond with no further right of appeal. The lessee/ operator can then enter onto the land as specified above. If an appeal is filed, the action cannot be approved until the matter is settled by a decision from the Director or his delegated authority approving or disapproving the bond.

In no instances will lease action such as an APD be approved in the absence of the surface owner consent without first satisfying the requirements of 43 CFR 3814. The purpose of these requirements is to ensure that the surface owners are treated fairly, and the mineral lessee/operators are allowed to enjoy the full privileges of their lease.

In instances where landowner demands become unreasonable or excessive, the operator is protected by 43 CFR 3814 regulations. Conversely, BLM is assuring the landowners of the opportunity to protect themselves and to assure just compensation via the 43 CFR 3814 regulations.

If the landowner and lessee/operator cannot agree or settle on a payment for damages within the lifespan of the authorization(s), especially if the lease is to be abandon, then the landowner should take her/his action to a court of competent jurisdiction to secure payment of such damages. The lessee/ operator has the option also to go to court to settle for payment of damages to the landowner. This may be especially true if a lessee/landowner should want their bond released from any lease obligations including termination. If an agreement cannot be reached for settlement for the payment of damages, either party may go to court at anytime in this above mentioned process to have the court set the amount of damages which are to be paid at that time. Another option that could be pursued by a lessee/operator for access to develop federal minerals is via state condemnation procedures.

It is not BLM's position to encourage the practice of payment of damages in lieu of restoration, nor to question the terms and dollar amounts under which an agreement is made. It is merely a position to assure that an agreement is reached which is acceptable to both parties. The BLM does have the right according to the MLA to require additional surface reclamation measures on all lease actions. However, they must be reasonable, justifiable, and in compliance with all pertinent laws. The goal should be to restore these areas disturbed by lease activities and operations to their original condition or to a reasonable environmentally sound condition. The surface owner should be compensated for all damages created by lease development.

Policy and Guidance for Authorizing Class II Injection Wells for Fluid Disposal located on Split Estate, Private Surface/Federal Minerals.

If an oil and/or gas well located within a federal oil and gas lease on split estate is converted to an injection well for disposing of off-lease, unit-produced fluids by either a third party or the current oil and gas lessee/operator, a right-of-way (ROW) is **not** the appropriate authorization and will **cease** being the permitting instrument. This policy resulted from two key IBLA decisions: Mallon Oil Company (104 IBLA 145, September 2, 1988), and Phillips Petroleum Company (105 IBLA 345, November 17, 1988). The outcome from the Mallon Oil Company case was that once the minerals have been removed from the ground, the void formerly occupied by the minerals reverts to the surface owner. In this case both the surface and minerals were owned by the United States, and the court upheld that an ROW issued by BLM was the appropriate authorization. In the Phillips Petroleum Company case which involved split-estate lands, the BLM did not have the authority to issue a permit for the disposal of salt water into a dry well located on private surface and federal minerals. In actuality, BLM used the wrong authorization mechanism—a permit pursuant to section 302(b) of the FLPMA instead of an ROW under section 501 of the FLPMA. However, the BLM was not the owner. According to the Mallon Oil Company case decision, the void space is the property of the surface owner. Henceforth, the federal mineral estate will be protected using the following guidelines and procedures.

Where BLM determines that there are federal minerals within the formation for injection of fluids, the appropriate authorization for fluid disposal on existing federal oil and gas leases on split estate is by an approved Sundry Notice (Form 3160-5) These well activities will be the responsibility of the appropriate lessee/operator and **not** a third party.

In considering and documenting feasibility for each case, the following factors must be analyzed, where applicable, in the applicant's proposal for subsequent well operation (Sundry Notice): (1) geology, (2) economic factors, (3) volume of produced

fluids, (4) hydrology and hydrogeology, (5) land use plans, (6) availability of private, state, and other land disposal sites, (7) state and/or federal agencies' permitting requirements (Onshore Oil and Gas Order #7, 1994), (8) water quality, (9) well bore schematics (present and/or proposed), (10) monitoring requirements of down hole injection/disposal, and, (11) other factors determined by the authorized officer. Not only the applicant, but even more important, the BLM must consider these factors before approving an authorization.

If the proposal is determined to be feasible, and a Sundry Notice is the instrument of authorization, the following conditions and stipulations should be considered and included as part of the authorization:

1. A stipulation stating, "The disposal well authorization may be terminated by the authorized officer of the BLM by a decision notifying the approved lessee\operator thirty days (30) prior to the date of termination. Termination must be for cause which includes, but is not limited to, compliance with both the lease and specific Sundry Notice authorization stipulations and conditions as well as the protection of the federal mineral estate, and the laws and regulations that govern thereof.

2. An approved underground injection control (UIC) permit issued by the State of Wyoming, Oil and Gas Conservation Commission (WOGCC), and written approval from the surface owner.

3. Produced fluid disposed in a well must be traced to the specific oil and gas well(s) from which it came, and these specific well(s) so stated as part of the approved Sundry Notice.

Converting federal oil and gas oil wells within a federal lease on split-estate lands to Class I commercial injection wells (wells used to dispose of hazardous waste; 40 CFR 144.6, 1993) will **not** be authorized for fluid disposal into a formation containing federal minerals.

If the BLM determines that the produced fluids from off-lease/unit is to be disposed of by injection into a formation found to be totally void of federal minerals, the following conditions **must** be addressed before a well is approved for disposal purposes:

1. The lessee/operator must comply with all the appropriate regulations within 43 CFR 3160 (1994), and more specifically section 3162.3-4, "Well Abandonment."

2. If used for disposal purposes, the BLM must consider that the well will meet specific criteria including: (1) that appropriate steps will be taken to avoid intermingling of fluids (oil, gas, and water) between formations or intervals that contain fluids of significant different quality, and (2) protect **all** federal minerals that may occur in other formations.

3. For an abandoned federal well to be used for subsurface disposal of off-lease/unit produced fluids into a formation depleted of federal minerals, a BLM release form must be properly filled out and signed by the private surface owner(s), and accepted by the BLM authorized officer. By signing this release form, the private surface owner acknowledges her/his potential future liability for disposal activities and for assuring the operation of the well to standards as required by appropriate federal and state regulatory agencies. With an approved release, the landowner also could ultimately assume the responsibility for the final plugging and reclamation requirements for the well. When BLM accepts this release, the lessee/operator's oil and gas bond should also be released for this well.